

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CHELSEA ROBERTS, Individually and as heir
of deceased G.E.D., a minor, *et al.*,

Plaintiffs,

v.

NYE COUNTY, *et al.*,

Defendants.

Case No. 2:22-cv-00398-RFB-EJY

ORDER

I. INTRODUCTION

Before the Court is Defendant Nye County (“Nye County”)’s Objection to Magistrate Judge Elayna Youchah’s Order and Report and Recommendation (ECF No. 75). ECF No. 78. Magistrate Judge Youchah issued an Order granting in part Plaintiffs’ Motion to Amend the Complaint. ECF No. 50. Magistrate Judge Youchah also issued a Recommendation that certain claims in Plaintiffs’ proposed Second Amended Complaint be dismissed with prejudice, and other claims be dismissed without prejudice. *Id.*

For the reasons stated below, the Court affirms the Order of the Magistrate Judge and accepts in part and rejects in part the recommendations in the Report. Plaintiffs are given five days to file a Second Amended Complaint consistent with this Order, after which all pending Motions to Dismiss the original Complaint (ECF Nos. 21, 22, 23, 25) will be denied as moot.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs commenced this action by filing a civil complaint on February 1, 2022 in the Eighth Judicial District Court for the State of Nevada. ECF No. 1-1. Defendants removed the

1 matter to Federal Court on March 2, 2022. ECF No. 1.¹ In the operative complaint attached to the
 2 Notice of Removal (“the Complaint”) (ECF No. 1-4), Plaintiffs allege that G.E.D. and J.E.D.,
 3 minor children, were passengers in a vehicle driven by their father Michael Durmeier and his fiancé
 4 Lauren Starceвич, on March 27, 2021, when they were driving from Teton County, Idaho to Las
 5 Vegas. Starceвич’s son Emerson was also a passenger. Plaintiff Roberts is the natural mother of
 6 G.E.D. and J.E.D. ECF No. 1-4. At approximately 3:45 p.m. the Durmeiers’ vehicle was driving
 7 southbound on U.S. 95 in Nye County, Nevada, where it was struck by a vehicle driven by Tyler
 8 Kennedy (“Kennedy”) who was under the influence of drugs. Id. As a result of the action,
 9 Durmeier, G.E.D., and Starceвич were killed; J.E.D. and Emerson were seriously injured. Id.
 10 Roughly an hour and fifteen minutes prior to the accident, Kennedy had an interaction with
 11 individual Defendants, while intoxicated, after which he was released to drive. Plaintiffs brought
 12 ten causes of action against Defendants and sought general, special, and compensatory damages
 13 Id.

14 On March 25, 2022, the following Defendants filed motions to dismiss the Complaint:
 15 Defendants Luke Stand and Nevada Highway (ECF No. 11); Nye County (ECF No. 12);
 16 Defendants Isaac Champlin, Daniel Fischer, Brooke Gentry, Michael Mokeski, Breanna Nelson,
 17 and Alan W. Shrimp (ECF No. 13), and Nye County (ECF No. 15). On April 1, 2022 and April
 18 6, 2022, the parties submitted stipulations to modify the briefing schedule related to the numerous
 19 Motions to Dismiss. ECF Nos. 17, 18, 19, 24. On April 5 2022 and April 6, 2022, the Court
 20 granted the parties’ stipulations and ordered Plaintiffs to file their responses by May 6, 2022. ECF
 21 Nos. 21, 22, 23, 25. On April 22, 2022, Plaintiffs responded to the Motions to Dismiss the

22
 23 ¹ There is some confusion in the parties’ briefing about what to call the Complaint included as the Fourth
 24 Exhibit to the Petition for Removal. ECF No. 1-4. Plaintiff filed a Complaint on February 1, 2022 in the Eighth
 25 Judicial Court (ECF No. 1-3) but then filed an Amended Complaint (raising § 1983 claims) on February 7, 2022 (ECF
 26 No. 1-4). Although the Court “takes [a] case as it finds it on removal,” Butner v. Neustadter, 324 F.2d 783, 785 (9th
 27 Cir. 1963), as soon as “a case has been removed to federal court, it is settled that federal rather than state law governs
 28 the future course of proceedings, notwithstanding state court orders issued prior to the removal.” Preaseau v. Prudential
Ins. Co. of Am., 591 F.2d 74, 79 (9th Cir. 1979). The operative complaint in this action was filed in state court on
 February 7, 2022, as Defendants removed the case on March 2, 2022. The Court further notes that federal pleading
 standards differ sharply from those in Nevada. See, e.g., W. States Constr., Inc. v. Michoff, 108 Nev. 931, 936, 840
 P.2d 1220, 1223 (1992) (explaining that, because Nevada is a notice-pleading state, courts in Nevada “liberally
 construe pleadings to place into issue matters which are fairly noticed to the adverse party.” (internal quotation marks
 omitted)).

1 Complaint, to which they attached countermotions to amend the Complaint as exhibits. ECF Nos.
2 26, 27, 28, 30. On April 22, 2022, Plaintiffs filed a Notice of Non-opposition to Defendant Nye
3 County Sheriff's Office dismissal from the lawsuit. ECF No. 29. On April 26, 2022, the Clerk of
4 Court advised Plaintiffs' counsel to refile their countermotions as separate documents. ECF No.
5 31. On April 26, 2022, Plaintiffs filed a Motion for leave to file an Amended Complaint. ECF
6 No. 32. On May 23, 2022, Defendants Ryan Gallagher and the Nevada Bureau of Land
7 Management filed a Motion to Dismiss. ECF No. 43. On June 6, 2022, Plaintiffs filed their Notice
8 of Non-opposition to the Bureau of Land Management and Ryan Gallagher's Motion to Dismiss.
9 ECF No. 44. On July 8, 2022, the parties filed a proposed stipulated Discovery Plan and
10 Scheduling Order. ECF No. 46. The same day, the Court granted the stipulation and issued an
11 Order setting the Discovery deadline for March 2, 2023, and a dispositive motions deadline of
12 April 3, 2023. ECF No. 47. On August 22, 2022, Plaintiffs filed a second Motion to Amend.
13 ECF No. 50. On September 5, 2022, Defendant Nye County responded to Plaintiffs' second
14 Motion to Amend. ECF No. 51. On September 6, 2022, the following Defendants joined
15 Defendant Nye County's response: Defendants Nevada Highway Patrol and Luke Stang (ECF No.
16 52); Defendants Isaac Champlin, Daniel Fischer, Ryan Gallagher, Brooke Gentry, Michael
17 Mokeski, Breanna Nelson, Alan W. Schrimpf, and Luke Stang (ECF No. 53). On September 12,
18 2022, Plaintiffs filed their reply in support of their second Motion to Amend. ECF No. 54.

19 On December 7, 2022, the parties filed a stipulation to extend the Discovery deadline. ECF
20 No. 63. The Court issued an Order the same day, granting the parties request and extending the
21 Discovery deadline to December 1, 2023. ECF No. 64.

22 On December 16, 2022, Defendants Breanna Nelson, Alan W. Schrimpf, Brooke Gentry,
23 Michael Mokeski, and Daniel Fischer filed a Motion for a Protective Order to Stay Discovery,
24 which is currently pending before the Magistrate Judge. ECF No. 66. On December 31, 2022,
25 Plaintiff responded to the Motion for a Protective Order to Stay Discovery. ECF No. 67. On
26 January 4, 2023, Defendant Nye County joined the Motion. ECF No. 68. On January 9, 2023,
27 Defendants Isaac Champlin, Daniel Fischer, Brooke Gentry, Michael Mokeski, Breanna Nelson,
28 Alan W. Schrimpf replied in support of the Motion. ECF No. 69. On February 6, 2023 the parties

1 filed a Stipulated Confidentiality Agreement and Protective Order, which the Court granted the
 2 same day. ECF Nos 71, 72. On February 23, 2023, the Magistrate issued an Order and Report
 3 and Recommendation, granting in part Plaintiff's second Motion to Amend (ECF No. 50) and
 4 recommending that certain claims in the proposed Second Amended Complaint be dismissed with
 5 and without prejudice, respectively. Defendant Nye County timely objected to the Order and
 6 Report and Recommendation. ECF No. 78. This order follows.

7 8 **III. DISCUSSION**

9 The Court finds, for the following reasons, that the Magistrate Judge did not commit clear
 10 error or act contrary to law in allowing a subset of the claims in granting in part Plaintiff's Motion
 11 for Leave to Amend and in finding that certain claims not futile. The Court declines to adopt
 12 recommendations in the Report that certain claims be dismissed without prejudice as that is more
 13 appropriately addressed at the Motion to Dismiss phase of the pretrial process. The Court further
 14 rejects in part the recommendation in the report that certain claims be dismissed with prejudice.

15 **A. The Magistrate Judge's Order**

16 **a. Legal Standard**

17 The Court may reconsider pretrial matters decided by a magistrate judge only if it has been
 18 established that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. §
 19 636(b)(1)(A); LR IB 3-1. This standard is deferential. "A finding is clearly erroneous if it is (1)
 20 illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in
 21 the record." Ibrahim v. U.S. Dep't of Homeland Sec., 835 F.3d 1048, 1058 (9th Cir. 2016) (citation
 22 and quotation marks omitted). Under the contrary to law standard "[t]he reviewing court may not
 23 simply substitute its judgment for that of the deciding court." Grimes v. City and Cty. of San
 24 Francisco, 951 F.2d 236, 241 (9th Cir. 1991) (citation omitted).

25 **b. Analysis**

26 As the Magistrate Judge noted in her Order, in the Ninth Circuit, leave to amend the
 27 pleadings pursuant to Fed. R. Civ. P. 15(a)(2) is treated "with 'extreme liberality.' Eminence
 28 Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam)." The Magistrate

Judge noted the five factors courts in this Circuit consider when deciding whether to grant a motion pursuant to Rule 15(a)(2): (1) if the moving party acted in bad faith; (2) if the moving party unduly delayed the request; (3) if the opposing party will suffer prejudice; (4) if amendment is futile; and (5) if plaintiff has previously amended its complaint. Eminence Capital, LLC, 316 F.3d at 1052 (listing out the “Foman” factors, originally presented in Foman v. Davis, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962)). The Magistrate Judge further noted that Defendants, in opposing Plaintiffs’ second Motion to Amend, only argued futility. Indeed, Nye County admitted the same in its Opposition to the Magistrate Judge’s Order and Recommendation: “The only factor at issue with respect to Plaintiffs’ Second Motion to Amend is futility.”

In Eminence Capital, the Ninth Circuit explicitly held that “[p]rejudice is the touchstone of the inquiry under rule 15(a) Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.” 316 F.3d at 1052 (internal citations and quotation marks omitted); see also Sweaney v. Ada Cty., Idaho, 119 F.3d 1385, 1393 (9th Cir. 1997) (“[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.”).

The Magistrate Judge granted in part Plaintiffs’ second Motion to Amend the Complaint (ECF No. 50), finding amendment would not be futile, and specifically allowed the following claims to proceed against the following defendants:

- (1) Plaintiffs’ § 1983 claim may proceed against Defendants Breanna Nelson, Alan Schrimpf, Daniel Fischer, and Brooke Gentry;
- (2) Plaintiffs’ negligence and gross negligence claims may proceed against Defendants Breanna Nelson, Alan Schrimpf, Daniel Fischer, Brooke Gentry, and Nye County (under respondeat superior);
- (3) Plaintiffs’ wrongful death claim may proceed against Defendants Breanna Nelson, Alan Schrimpf, Daniel Fischer, Brooke Gentry, and Nye County (under respondeat superior [liability]);
- (4) Plaintiffs’ intentional infliction of emotional distress claim may proceed against

Defendants Breanna Nelson, Alan Schrimpf, Brooke Gentry, and Nye County (under respondeat superior);

(5) Plaintiffs' negligent infliction of emotional distress claim may proceed against Defendants Breanna Nelson, Alan Schrimpf, Brooke Gentry, and Nye County (under respondeat superior); and,

(6) Plaintiffs' interference with family relations claim may proceed against Defendants Breanna Nelson, Alan Schrimpf, Daniel Fischer, and Brooke Gentry.

Nye County first argues that in reaching this conclusion, the Magistrate Judge applied the wrong standard in reviewing a motion to amend, because of the word "undisputed," which was used to describe a subset of the factual allegations in the proposed Second Amended Complaint. The Court disagrees. While the use of that word is normally restricted to Motions for Summary Judgment, there is no indication that the Magistrate Judge was passing judgment on whether the facts as plead were supported by evidence. The Magistrate Judge clarified in a footnote that she must treat the factual allegations in the proposed pleadings (here, the proposed Second Amended Complaint) as true. The Court further notes that the Ninth Circuit has long held that courts reviewing the sufficiency of the pleadings must "take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party." National Wildlife Federation v. Espy, 45 F.3d 1337, 1340 (9th Cir. 1995). Thus, it is irrelevant whether the allegations in the pleadings are disputed or undisputed; they are taken as true at this stage of the pretrial process in evaluating motions to dismiss and motions for leave to amend the complaint.

Second, Nye County argues that the Magistrate Judge erred by "amplifying and overstating" Plaintiffs' allegations beyond what was contained in the proposed Second Amended Complaint. The Court disagrees. The Magistrate Judge had an obligation determine if there was "no set of facts" that could be "proven under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Sweaney v. Ada Cty., Idaho, 119 F.3d 1385, 1393 (9th Cir. 1997). The Court finds that the Magistrate Judge met that obligation and found Defendants had not met their burden as to five claims listed above.

Third, Nye County argues that the Magistrate Judge "ignored, misapplied, or otherwise

1 discounted" the first element required for the state-created danger exception, which undergirds
2 Plaintiffs' § 1983 claim.

3 "The 'general rule' is that a state actor is not liable under the Due Process Clause 'for its
4 omissions.'" Pauluk v. Savage, 836 F.3d 1117, 1122 (9th Cir. 2016) (quoting Munger v. City of
5 Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000)). "There are two exceptions to this
6 general rule: '1) when a "special relationship" exists between the plaintiff and the state (the special-
7 relationship exception); and (2) when the state affirmatively places the plaintiff in danger by acting
8 with "deliberate indifference" to a "known or obvious danger" (the state-created danger
9 exception).'" Id. (quoting Patel v. Kent Sch. Dist., 648 F.3d 965, 971-72 (9th Cir. 2001)).

10 "Under the state-created danger doctrine, a state actor can be held liable for failing to
11 protect a person's interest in his personal security or bodily integrity when the state actor
12 affirmatively and with deliberate indifference placed that person in danger. The doctrine holds
13 state actors liable 'for their roles in creating or exposing individuals to danger they otherwise would
14 not have faced.'" Id. (quoting Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006)).

15 "To prevail on a state-created danger due process claim, a plaintiff must show more than
16 merely a failure to create or maintain a safe . . . environment. First, a plaintiff must show that the
17 state engaged in 'affirmative conduct' that placed him or her in danger." Pauluk, 836 F.3d at 1124
18 (quoting Patel, 648 F.3d at 974). "This 'affirmative conduct' requirement has several components.
19 A plaintiff must show not only that the defendant acted 'affirmatively,' but also that the affirmative
20 conduct placed him in a 'worse position than that in which he would have been had [the state] not
21 acted at all.'" Id. at 1125 (quoting Johnson v. City of Seattle, 474 F.3d 634, 641 (9th Cir. 2007)
22 (citing Kennedy, 439 F.3d at 1063). "The affirmative act must have exposed the plaintiff to 'an
23 actual, particularized danger,' and the resulting harm must have been foreseeable. Id. (citing
24 Kennedy, 439 F.3d at 1063). "Second, the state actor must have acted with 'deliberate indifference'
25 to a 'known or obvious danger.'" Id. (citing Patel, 648 F.3d at 974). "'Deliberate indifference'
26 requires a 'culpable mental state' more than 'gross negligence.'" Id.

27 The Magistrate Judge reviewed the pleadings and concluded that the § 1983 claims against
28 Nye County were not futile:

1 Here, Plaintiffs state they were exposed to a danger they would not
2 have otherwise faced when Defendants showed substantial force,
3 agitated Kennedy, ignored his intoxication and possession of illegal
4 narcotics they knew he intended to use again, and required him to
5 drive out of Nye County in order to avoid paperwork. Plaintiffs
6 further allege Deputy Nelson followed Kennedy for at least 30
7 minutes observing him crossing the center line of the highway—the
8 exact event leading to the head on collision underlying this
9 case—but chose to do nothing in response because she and her co-
10 Nye County law enforcement officers just wanted Kennedy out of
11 their jurisdiction. Knowing Kennedy had a propensity to speed when
12 driving high on fentanyl and methamphetamines, knowing he
13 intended to use these drugs again to avoid getting sick, and knowing
14 Kennedy could seriously injure or kill someone based on erratic and
15 high speed driving, the Officers chose to do nothing demonstrating
16 deliberate indifference to the specific foreseeable danger Kennedy
17 posed to other drivers. These facts support a plausible claim that
18 when Defendants Nelson, Fischer, Gentry, and Schrimpf
19 (sometimes, collectively, “the Potentially Liable Officers” or the
20 “Officers”) acted and failed to act, given the totality of the
21 information they had and observed, their deliberate failure to do
22 their duty led directly to a foreseeable crash resulting injuries.

23 ECF No. 75 at 19:10-19:24.

24 Nye County argues that the Magistrate Judge relied on an unverified “emboldenment
25 theory” and improperly identified the officers’ *failure* to act as conduct triggering the state-created
26 danger exception. The Court disagrees. The Magistrate Judge identified affirmative conduct that
27 was pled in the proposed Second Amended Complaint: that the officers followed Kennedy down
28 the highway for an extended period of time after they encouraged him back on the road, when they
knew he was in a heightened state of anxiety fueled by drug consumption, and initially “removing
Kennedy from his parked vehicle and then subsequently directing him to drive away, knowing that
he was under the influence of controlled substances.” Furthermore, Nye County does not cite to
caselaw foreclosing Plaintiffs’ allegations that officer conduct that “emboldens” a third actor

cannot be affirmative conduct outside of the domestic violence context. The Magistrate Judge's reference to Martinez v. City of Clovis was not improper, as the Martinez Court (1) recognized that the failure to arrest *alone* was not enough to give rise to a state-created danger exception, and (2) noted that in one context (domestic violence) where officers affirmatively emboldened an abuser while failing to arrest them, the state-created danger exception could arise. 943 F.3d 1260, 1277, n.19 (9th Cir. 2019).

Nye County also argues that Plaintiffs cannot meet the first requirement of the state-created danger exception because the danger was not particularized to the victims. In support, they cite to a recent Ninth Circuit case decided after the Magistrate Judge's Order was issued, Sinclair v. City of Seattle, No. 21-35975, 2023 WL 2292130 (9th Cir. Mar. 1, 2023).

The Court notes that, critically, the Sinclair Court *declined* to resolve a Circuit split relevant to the very question in this case: whether those traveling on a highway for a short period of time are directly exposed to a particular danger related to a driver under the influence whose conduct is traceable to affirmative state conduct. Sinclair, 2023 WL 2292130 at **21-22 ("The Seventh Circuit held [in Reed v. Gardner, 986 F.2d 1122, 1123-24 (7th Cir. 1993)] that the state-created danger doctrine could apply because "the other motorists" in the area were "worse off with a drunk driver heading toward them than a sober one." Id. at 1125, 1127. At the same time, the Reed court reasoned that "[t]he dangers presented by drunk drivers are familiar and specific; in addition, the immediate threat of harm has a limited range and duration." Id. at 1127. We need not definitively resolve whether to adopt the Seventh Circuit's minority rule showcased in Reed because it would not change the result [in this case]."). Therefore, Sinclair does not automatically render Plaintiffs' § 1983 claim futile.

B. The Report and Recommendation

a. Legal Standard

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). A party may file specific written objections to the findings and recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Local Rule IB 3-2(a). When written objections have been filed, the district court is

1 required to "make a de novo determination of those portions of the report or specified proposed
 2 findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); see also Local
 3 Rule IB 3-2(b).

4 **b. Analysis**

5 Nye County argues that the Magistrate Judge's Report and Recommendation seemingly
 6 foreclosed Defendants' opportunity to file Motions to Dismiss in response to the Second Amended
 7 Complaint. This is not true. Chronologically, the Court must decide whether the *proposed* Second
 8 Amended Complaint may be filed in the first place before Defendants may have an opportunity to
 9 move to dismiss it. Defendants argued in their opposition to Plaintiffs' Motion for Leave to
 10 Amend the Complaint that Plaintiffs' state tort claims, "failed as a matter of law" because "no
 11 affirmative harm exists under Plaintiffs' new set of facts;" that "Plaintiffs' claims fail as
 12 Discretionary Function Immunity still applies to Plaintiffs' new set of facts" and that "Plaintiffs'
 13 claims for civil conspiracy fail to meet the pleading standard." The Court agrees with the
 14 Magistrate Judge that the Defendants did not meet their burden under Rule 15, and notes further
 15 that since Nye County did not raise prejudice as an objection to the Magistrate Judge's order, and
 16 admit they only argued "futility" and raise no other Foman factor, Ninth Circuit precedent
 17 overwhelmingly favors amendment. Eminence Capital, 316 F.3d at 1052 ("Absent prejudice, or a
 18 strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a)
 19 in favor of granting leave to amend.") (internal citation omitted).

20 The Court declines to adopt any analysis in the Recommendation that makes findings of
 21 fact beyond the scope of the Rule 15(a) inquiry, which, in light of Defendants' failure to argue
 22 prejudice, is limited indeed. There is nothing in the Magistrate Judge's Order that is binding on
 23 the Court regarding any future Motion to Dismiss the amended pleadings. Hal Roach Studios v.
 24 Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990) (noting that an amended pleading
 25 supersedes the original); compare Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009)
 26 (noting that under Rule 15, "Courts are free to grant a party leave to amend whenever justice so
 27 requires, and requests for leave should be granted with extreme liberality.") (internal quotation
 28 marks omitted) with Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019)

1 (outlining the plausibility standard for Motions to Dismiss pursuant to Rule 12(b)(6)).

2 The Court now turns to the portions of the Report and Recommendation the parties did not
3 oppose, which the Court may "accept, reject, or modify, in whole or in part." 28 U.S.C. § 636(b)(1).
4 The Court declines to adopt recommendations in the Report that certain claims be dismissed
5 *without* prejudice, as noted above; those arguments should be addressed at the Motion to Dismiss
6 phase of the pretrial process, as it relates to the Second Amended Complaint, which is still pending
7 and has not been filed to the docket.

8 The Magistrate Judge recommended that two of Plaintiffs' claims be denied *with* prejudice.
9 The Magistrate Judge first recommended that the Court dismiss with prejudice Plaintiffs' negligent
10 hiring, training, supervision, and retention claim against *all* Defendants. The Court rejects this
11 recommendation as to Defendants that employed the individual defendants ("Employer
12 Defendants"): Nye County and the Department of Public Safety Division of Nevada Highway
13 Patrol. Discretionary Immunity issues are fact intensive, and Employer Defendants may argue at
14 the Motion to Dismiss and, if necessary, Summary Judgment stage, that the allegations fail to state
15 a claim or that such claims are not substantiated by evidence. The Court adopts the
16 recommendation as to Defendants who are not employers in this case.

17 The Magistrate Judge also recommended that Plaintiffs' civil conspiracy claim be
18 dismissed with prejudice to the extent Plaintiffs pled (1) Defendants Breanna Nelson, Alan
19 Schrimpf, Daniel Fischer, and Brooke Gentry conspired with Nye County, (2) Trooper Stang
20 conspired with the Nevada Department of Public Safety, and (3) that Nye County and the Nevada
21 Department of Public Safety conspired. The Court adopts this recommendation as these proposed
22 amended claims are futile under Nevada law. See, generally, Collins v. Union Fed. S&L Ass'n,
23 662 P.2d 610, 622 (Nev. 1983) ("Agents and employees of a corporation cannot conspire with
24 their corporate principal or employer where they act in their official capacities on behalf of the
25 corporation and not as individuals for their individual advantage.").

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1 **IV. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that Defendant Nye County's appeal of the Magistrate
3 Judge's Order portion of the Order and Report and Recommendation (ECF No. 75) is **DENIED**
4 for the reasons set forth above.

5 **IT IS FURTHER ORDERED** that the Report and Recommendation portion of the Order
6 and Report and Recommendation (ECF No. 75) is **DENIED** in part and **ADOPTED** in part. The
7 Court only **ADOPTS** the recommendation that (A) Plaintiffs' fifth cause of action (negligent
8 hiring, training, supervision, and retention) be **DISMISSED WITH PREJUDICE** as to non-
9 Employer Defendants and that (B) Plaintiffs' civil conspiracy claim be **DISMISSED WITH**
10 **PREJUDICE** to the extent Plaintiffs pled (1) Defendants Breanna Nelson, Alan Schrimpf, Daniel
11 Fischer, and Brooke Gentry conspired with Nye County, (2) Trooper Stang conspired with the
12 Nevada Department of Public Safety, and (3) that Nye County and the Nevada Department of
13 Public Safety conspired.

14 **IT IS FURTHER ORDERED** that Plaintiffs **FILE** a Second Amended Complaint within
15 five days, consistent with this order, amending the fifth cause of action (negligent hiring, training,
16 supervision, and retention) and eighth cause of action (civil conspiracy) accordingly.

17 **IT IS FURTHER ORDERED** that Plaintiff's first Motion for Leave to File an Amended
18 Complaint (ECF No. 32) is **DISMISSED** as moot.

19 **IT IS FURTHER ORDERED** that all pending Motions to Dismiss (ECF Nos. 11, 12, 13,
20 15, 43) the Complaint are **DISMISSED** without prejudice as to refiling subsequent to the filing of
21 the Second Amended Complaint.

22
23 DATED: March 14, 2023



24
25 **RICHARD F. BOULWARE, II**
26 **UNITED STATES DISTRICT JUDGE**